

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

DOMINICK'S FINER FOODS, INC. A DIVISION OF SAFEWAY INC.¹

Employer

and

NATIONAL PHARMACISTS ASSOCIATION

Petitioner

Case 13-RC-20486

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record² in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.³

3. The labor organization(s) involved claim(s) to represent certain employees of the Employer⁴.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act⁵.

All full-time and regular part-time staff pharmacists and relief pharmacists employed by the Employer at its Chicagoland facilities; but excluding all casual employees, clerical employees, guards, and supervisors as defined in the Act.

DIRECTION OF ELECTION*

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which

commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by National Pharmacists Association

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of the full names of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359, fn. 17 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision 2 copies of an election eligibility list, containing the full names and addresses of all of the eligible voters, shall be filed by the Employer with the undersigned Regional Director who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in **Suite 800, 200 West Adams Street, Chicago, Illinois 60606** on or before December 22, 2000. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, Franklin Court Building, 1099-14th Street, N.W., Washington, D.C. 20570**. This request must be received by the Board in Washington by December 29, 2000.

DATED December 15, 2000 at Chicago, Illinois.

/s/ Elizabeth Kinney
Regional Director, Region 13

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- */ The National Labor Relations Board provides the following rule with respect to the posting of election notices:
- (a) Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Director in the mail. In all cases, the notices shall remain posted until the end of the election.
 - (b) The term "working day" shall mean an entire 24-hour period excluding Saturdays, Sundays, and holidays.
 - (c) A party shall be estopped from objection to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Director at least 5 working days prior to the commencement of the election that it has not received copies of the election notice.

1/ The names of the parties appear as amended at the hearing.

2/ The arguments advanced by the parties at the hearing have been carefully considered.

3/ The Employer is a corporation engaged in the operation of retail grocery stores in the Chicagoland area.

4/ At the hearing the Employer declined to stipulate that Petitioner is a labor organization. The Petitioner (hereinafter "the Association") has been in existence since 1969 and was restructured in 1984 with a new constitution and bylaws. The Association represents pharmacists and pharmacy interns employed by Walgreens Company in what is known as the Illiana area, a geographical area covering the northern part of Indiana and the northern part of Illinois, including Rockford and Chicago and has negotiated an executed collective-bargaining agreement with Walgreens. Article II of the Petitioner's Constitution and Bylaws states in part that:

"The object and purpose of this Association shall be to benefit its members and improve their conditions by every means, including but not limited to: (a) Securing of economic advantages, including better wages, hours and working conditions, through organization, collective bargaining and utilization of other lawful means; (b) By organizing and uniting in this Association, all persons eligible for membership herein; (c) By engaging in all such civic, social, political, legal, economic, cultural, educational, charitable, and other activities, as will advance this Association's standing in the community, further the interests of this Association and its members, and further the profession of pharmacy directly or indirectly; (d) By advancing and strengthening the rights of workers to bargain collectively...."

Membership in the Association is open to "any person employed in any employment over which this Association claims or exercises jurisdiction..." According to Charles Sauer, Petitioner's Executive Director, Association members vote in elections for officers, attend quarterly meetings, vote to ratify the collective bargaining agreement during the negotiation process and file grievances.

Section 2(5) of the Act provides that "the term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work." In the instant case, it is clear that Petitioner is an association established for the purpose of dealing with employers as a bargaining representative and, therefore, the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

5/ The Petitioner seeks to represent a unit of all full time and regular part time relief pharmacists and pharmacy managers employed by the Employer at its current facilities throughout the Chicago Metropolitan area; but excluding all office clerical employees, guards and supervisors as defined in the Act.

The Employer contends that the pharmacy managers are statutory supervisors within the meaning of Section 2(11) of the Act and, therefore, should not be included in any unit found appropriate. The Employer takes the position that staff pharmacists working an average of less than four hours per week are casual employees and should also be excluded from any unit found appropriate. The Petitioner is willing to proceed to an election in any unit found appropriate.

The Employer operates a chain of retail grocery stores in the Chicagoland area. One hundred stores have pharmacies in them. Director of Pharmacy Ed Cohen oversees the pharmacy operations and for pharmacy matters reports directly to Rich Cancilla, Vice President of Pharmacy for Safeway Corporate and for non-pharmacy matters reports to Don Fitzgerald, Vice President of Marketing. The pharmacy operation is broken into three areas, which are overseen by regional pharmacy managers or RPMs who report directly to Ed Cohen. Larry Lerner oversees the southern area, Craig Sherman oversees the central area and Paul Goldman oversees the north area. There are between thirty-two and thirty-five stores per area. At the store level, there is a pharmacy manager at each pharmacy. The pharmacy managers report directly to their respective RPM. Most pharmacies are open Monday through Friday from 9:00 a.m. to 9:00 p.m. and Saturday and Sunday from 9:00 a.m. to 5:00 p.m. There are a few pharmacies which are open from 8:00 a.m. to 10:00 p.m., seven days a week, while a few others have slightly different hours of operation. There are a total of 269 pharmacists of which 100 are pharmacy managers. Depending on the volume of prescriptions handled by the pharmacy there, may be one or more pharmacy technicians. The pharmacy technicians are represented by two different locals of the United Food and Commercial Workers, Locals 1540 and 881.

Pharmacy operations are standardized and spelled out in the Safeway Pharmacy Policies and Procedure Manual. The manual spells out the daily operations for the pharmacy. Employees in each pharmacy are expected to review the manual and sign off on a form in the manual called the Pharmacy Employee Acknowledgement Form. The manual addresses the individual responsibilities of each employee classification in the pharmacy. The pharmacy manager is responsible for the operation of the pharmacy department. According to the manual, the pharmacy manager is responsible for maintaining staffing levels, the hiring, disciplining and training of pharmacy staff, customer service, compliance with federal and state regulations, scheduling of auxiliary personnel, managing requests for days off and overall compliance of company rules and policies as well as dispensing prescriptions and ensuring that each prescription dispensed is accompanied by a consultation. The staff pharmacists are responsible for dispensing prescriptions, customer service and assume the responsibilities as pharmacist in charge when the pharmacy manager is not present. The pharmacy technicians work under the direction of the pharmacists in charge and perform support services for the pharmacists such as data entry, filling of prescriptions, and various duties related to maintaining the pharmacy's inventory.

The pharmacy managers earn \$38.50 per hour, receive 500 stock options per year and a maximum year-end bonus of \$10,000 based on pharmacy sales. Pharmacy

managers receive ten cents per all scripts over one thousand scripts per week. The staff pharmacists earn \$36.00 per hour, receive 250 stock options per year and a maximum yearly bonus of \$5,000 plus five cents for all scripts over one thousand per week. The wages and working conditions of the pharmacy technicians are dictated by their collective-bargaining agreement. In Illinois, the practice of pharmacy is governed by the Pharmacy Practice Act of 1987. That law requires that pharmacists practicing in Illinois must hold a license issued by the Illinois Department of Professional Regulation. The license must be displayed in the pharmacy and there must be a licensed pharmacist present at all time while the pharmacy is open. Pharmacy technicians must also be licensed by the state.

The Employer's one hundred and sixty-nine staff pharmacists are divided amongst the one hundred pharmacies. During hours of operation, there must be a pharmacist in the pharmacy, this pharmacist is referred to as the pharmacist in charge, regardless of whether he is a pharmacy manager or staff pharmacist. There is little overlap between the hours worked by the pharmacy manager and the staff pharmacists. Pharmacy managers are responsible for setting up the pharmacy schedule and work with the staff pharmacist in order to ensure that there will always be a pharmacist present when the pharmacy is open. Each region has a pharmacy manager who is assigned the additional duty of being the scheduler. Once the pharmacy manger has worked out the pharmacists' schedule, he can either e-mail or fax it to the scheduler. Upon receipt, the scheduler assigns floater pharmacists to cover the pharmacies which may be shorthanded due to vacations and unfilled vacancies in order to ensure that there is a pharmacist present at all times. Pharmacy managers and staff pharmacists request vacations the same way, by submitting a vacation request to the scheduler at a certain time of the year, the scheduler then notifies them if their vacation request was approved. Pharmacy manager John Velk testified that there are five pharmacists at his pharmacy, but Velk and one other pharmacist are the only full time pharmacists. Velk testified that the schedules for his part-time pharmacists are set according to the hours they tell him they are available and he works out by agreement his schedule and that of the full time pharmacist.

The Employer authorizes a certain number of pharmacy technician hours to each pharmacy according to the number of prescriptions their pharmacy fills per week. Pharmacy managers have discretion whether to use the authorized technician hours. In order to receive any technician hours, the pharmacy must fill at least two hundred prescriptions per week. The pharmacy manager sets up the pharmacy technicians' work schedule. Unlike the schedule for pharmacists, the technicians' schedule remains in the pharmacy and is not sent to the scheduler. John Velk testified that his technician tells him when she wants off and he then makes arrangements to ensure that she receives her vacation pay. Some technicians split their time between two pharmacies in order to receive more hours.

Pharmacy managers are responsible for hiring their pharmacy technicians. After the pharmacy manager is approved by the RPM for technician hours, the pharmacy manager posts job openings and interviews candidates for the position. Once the

pharmacy manager has interviewed the potential candidate, the candidate is then interviewed by the store manager. The record is replete with examples of pharmacy managers hiring pharmacy technicians. Larry Lerner, currently the RPM for the southern area, testified that in his former position as pharmacy manager he hired pharmacy technicians and was responsible for soliciting applications, interviewing candidates and ultimately extending a job offer to those he deemed qualified. He further testified that in his current position as RPM he receives inquiries from his pharmacy managers regarding the pharmacy technicians' starting salary rate and the number of technician hours he/she may use. John Velk testified that he has always known that he has the authority to hire pharmacy technicians if he is approved for technician hours. Ed Cohen testified that, while a pharmacy manager, he hired two pharmacy technicians.

Cohen testified that pharmacy managers have also interviewed and hired staff pharmacists. Specifically, he testified that the pharmacy manager in Store 151 in Gurnee interviewed and was authorized to hire two staff pharmacists this year and Irwin Dorfman, pharmacy manager in Store 163 in Highland Park has also interviewed applicants for the position of staff pharmacist. Cohen testified that when the Employer acquires an independent pharmacy, it purchases the prescription files. Usually the pharmacist at that location will transfer to the Employer's system along with the files. Cohen testified that the Employer will guarantee the employment of the pharmacist for a period of time at the end of which he will be evaluated and depending on the outcome of the evaluation the pharmacy manager may receive an offer to stay. Cohen testified that pharmacy managers were instrumental in the interviewing and evaluating of Bruce Callahan and Robert Schrocki. Company-wide there is a pharmacy recruiter who is in charge of recruiting staff pharmacists.

The pharmacy manager can recommend that a technician be hired at a higher rate if they feel that the applicant so warrants it. The final decision in granting a higher starting rate rests with the human resources department. There is no formal evaluation system in place for pharmacy employees.

Pharmacy managers are responsible for the inventory and control of narcotics and must be present, according to the Employer's policy, during inventory. The pharmacy manager is the only person who can order Category II narcotics. He is the only employee authorized to fill out DEA paperwork reporting the loss or theft of specific narcotics. He is also responsible for ensuring that those working in his pharmacy are properly licensed. The pharmacy manager is identified to the public as the pharmacy manager. The pharmacy manager also has a higher clearance rating within the Dominick's PDX pharmacy network.

ANALYSIS

Supervisory Status - Pharmacy Managers

Section 2(11) of the National Labor Relations Act sets forth the test to determine supervisory status. It provides:

The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay-off, recall, promote, discharge, assign, reward, or discipline other employees, or to recommend such action, if in connection with the foregoing, the exercise of such authority is not merely routine or clerical in nature, but requires the use of independent judgment.

Possession of any of the indicia listed is enough to make an individual a supervisor. *Juniper Industries*, 311 NLRB 109, 110 (1993); however, it is well settled that in order to support a finding of supervisory status, it must be shown that the individual has the power to act on behalf of the employer with respect to other employees and exercises independent judgement in so doing. *International Center for Integrative Studies / The Door*, 297 NLRB 601 (1990). While supervisory status may be found where an individual exercises discretion with regard to any of the elements outlined in Section 2(11) of the Act, the exercise of some supervisory authority “in a merely routine, clerical, perfunctory or sporadic manner does not confer supervisory status on an employee.” *Bowne of Houston, Inc.*, 280 NLRB 1222, 1223 (1986); accord, *Clark Machine Corp.*, 308 NLRB 555 (1992). (1993). In determining supervisory status the Board has also considered secondary indicia, the possession of which weigh in favor of such supervisory status, factors such as whether the individual is considered by others to be a supervisor and whether he has the authority to grant time off. *Lasar Tool, Inc.*, 320 NLRB 105 (1995). The burden of proving that an individual is a statutory supervisor rests on the party alleging such status. *Bennett Industries*, 313 NLRB 1363 (1994).

Applying those principles to the instant case, I find that the Employer has demonstrated that the pharmacy managers are supervisors as defined in Section 2(11) of the Act. The Petitioner contends that pharmacy manager do not exercise independent judgment in connection with their duties. It is clear from the record that pharmacy managers do exercise independent judgment in hiring pharmacy technicians, scheduling staff pharmacists and pharmacy technicians, and assigning duties to pharmacy technicians. The pharmacy managers also effectively recommend whether to retain staff pharmacists from purchased pharmacies.

Petitioner argues that pharmacy managers’ authority to hire pharmacy technicians is circumscribed by a number of factors that limit the number of hours the manager can assign to a technician. However, while the decision whether to hire is circumscribed, the record reveals that once authorized to hire, the pharmacy managers interview and hire technicians with only limited, administrative involvement of the store manager. By selecting which applicant to hire, the pharmacy manager exercises supervisory authority.

The Petitioner has also argued that pharmacy managers do not have the authority to schedule or assign staff pharmacists. Once again, the Petitioner's argument misses the mark. John Velk testified that he sets up the pharmacy schedule according to the availability of his part-time pharmacist and that he sets up his schedule and that of his full time pharmacist by agreement. The ultimate goal is to ensure that there is a licensed pharmacist present at all times the pharmacy is open. While Mr. Velk may be accommodating and democratic in setting up the work schedule, that circumstance does

not negate the fact that he is exercising supervisory authority in setting up the pharmacy schedule.

In order to support a finding of supervisory status it is sufficient that one or more of the supervisory indicia be met. I find, based on the above and the record herein, that the pharmacy managers are Section 2(11) supervisors and, therefore, should be excluded from the unit.

Finally, the Employer contends that eleven employees should be excluded from the unit because they are casual employees. The Board has long held that employees are eligible to vote if they average four hours of work per week in the quarter preceding the decision. See, *VIP Movers, Inc.*, 232 NLRB 14, 15, and cases cited at n.7 (1977). Since the eleven employees at issue each averaged less than four hours per week, I shall exclude them from the unit found appropriate herein.

In sum, I find that the pharmacy managers and casual employees should be excluded from the unit.

There are approximately 158 employees in the unit found appropriate.

177-8520-2400; 177-8520-0800;
177-8520-4700; 177-3925; 362-6712;
460-5067-4200